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IN THE

Supreme Court of the United States

October Term, 1963

No. 723

INTERCITY TRANSPORTATION CO. INC.,
Petitioner,

against

HENRY A. BARNES, as Commissioner of Traffic of the City of New York,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The petitioner seeks a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Department, to review a judgment entered on an order of that court affirming a judgment of the New York Supreme Court, County of New York, dismissing petitioner's complaint.

On November 12, 1963, Mr. Justice HARLAN denied, for lack of a "substantial federal question," petitioner's application for a stay pending the making of the instant application for a writ of certiorari.

Jurisdiction

Petitioner asserts (Petition p. 2) that the Appellate Division, First Department of the New York Supreme Court is "The highest New York court in which a decision could be had" apparently because on October 3, 1963, the New York Court of Appeals denied petitioner's application for leave to appeal to that court.

But petitioner was not obliged to seek leave to appeal to the Court of Appeals. For the New York Civil Practice Law and Rules §5601(b), in effect since September 1, 1963, authorize an appeal to the Court of Appeals as of right

> "1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States".

A similar provision was contained in the former New York Civil Practice Act §588 subd. 1(a), which was superseded by the New York Civil Practice Law and Rules on September 1, 1963.

It is clear that throughout this litigation petitioner has sought to enjoin the respondent's actions upon the ground that those actions invaded petitioner's rights under the Constitution of the United States and constituted interference with commerce among the states in violation of Section 8 of the Constitution of the United States (Petition pp. 3, 4).

Indeed, on July 12, 1963 petitioner applied to Judge FULD of the New York Court of Appeals for a stay pending petitioner's then contemplated appeal as of right to that court as authorized above. The plan for such an appeal was abandoned apparently because petitioner was unwilling to risk its dismissal for lack of a substantial constitutional question. 6

Under these circumstances, it is clear that the Appellate Division of the New York Supreme Court, First Department is not the highest court of the State of New York from which petitioner could have obtained a decision as provided in 28 U. S. C. §1257(3). *Gorman v. Washington Univ.*, 316 U. S. 98, 100 (1942), approved and distinguished in *Teamsters Local v. Lucas Flour Co.*, 369 U. S. 95, 98-99 (1962); *Gotthilf v. Sills*, — U. S. —, 11 L. ed 2d 150 (1963).

The Question Presented

The petitioner is an interstate carrier for hire. It transports passengers and their baggage between certain points in the State of New Jersey and its private bus terminal at West 167 Street and St. Nicholas Avenue in New York City, *via* the George Washington Bridge connecting the States of New York and New Jersey, by virtue of a "Certificate" of Public Convenience and Necessity issued by the Interstate Commerce Commission by authority of the Motor Carrier Act of 1935 as amended (49 U. S. C. §301 *et seq.*).[7]

[7] Relevant excerpts from that certificate appear in petitioner's Appendix D.

The basic question involved is whether respondent's notice directing petitioner to discontinue stopping its buses on the streets of the City of New York, for the purpose of picking up and discharging its passengers, constitutes a violation of any of petitioner's rights under the Constitution of the United States or an interference with interstate commerce.

The Facts

The essential facts are not disputed. Indeed most of them are matters of public record.

The petitioner is an interstate carrier for hire, engaged in the business of transporting passengers and their baggage by motor carrier between certain points in New Jersey and its terminal at St. Nicholas Avenue and 167 Street in the Borough of Manhattan, City and State of New York by way of the George Washington Bridge.

As previously noted, this operation is in pursuance of a Certificate of Public Convenience and Necessity granted to petitioner by the Interstate Commerce Commission on December 28, 1955 in pursuance of the provisions of the Motor Carrier Act of 1935 as amended. Those provisions are now contained in 49 U. S. C., 307(b) of which provides:

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

The petitioner's aforementioned bus terminal is practically adjacent to the West 168th Street station of the Independent subway and the West 168th Street station of

the I. R. T. subway (235).* It is further undisputed that until shortly prior to the commencement of the action herein in the Supreme Court, New York County, two other bus companies, viz.: Public Service Coordinated Transport Co. and Rockland Bus Co. conducted operations similar to the above described petitioner's operation, to the respective bus terminals of those companies which were practically adjacent to petitioner's terminal.

Prior to 1959, the only authorized stops in New York City for the buses of the petitioner and for its competitors above named were on the plazas of the George Washington Bridge, near its New York end, and wholly outside the lines of any street, viz.: There was a stop on the South Plaza for "inbound" buses, and a stop on the North Plaza for "outbound" buses (241, 242). It is undisputed that those two stops were the petitioner's only authorized stops within the City of New York prior to the times hereinafter mentioned.

By letter dated August 12, 1959 (240, 244-246) the petitioner and the other two bus companies were advised that effective August 24, 1959 the stop on the South Plaza (for "inbound" buses) was being discontinued because of the construction work on the new level of the George Washington Bridge and on the new bus terminal at its easterly end. The letter further stated that effective August 24, 1959 a bus stop was being established for "inbound" buses on the west side of Broadway between West 178th and West 177th Streets, which was to continue in effect only during the period of construction of the new

* Numerals in parenthesis refer to folio numbers of the record in the New York Courts submitted by petitioner on this application.

level of the George Washington Bridge and the new bus terminal under construction at the easterly end of the bridge.

By letter dated March 20, 1961, petitioner and its two competitors aforementioned were advised that the bus stop on the North Plaza for "outbound" buses was being discontinued because of "George Washington Bridge construction on Ft. Washington Avenue" and that effective March 22, 1961 a bus stop was being established for "outbound" buses on the easterly side of Broadway between West 176th Street and West 178th Street for approximately ten months from March 22, 1961 (247, 248).

It is undisputed that all construction work on the new level of the George Washington Bridge as well as on the bus terminal at the easterly end of the bridge was completed on or about January 14, 1963 and that petitioner's competitors aforementioned have since not used either of those bus stops. It is further undisputed that by letter dated January 14, 1963 petitioner was advised that the Broadway bus stops were being discontinued effective February 4, 1963 "providing only closed door service between New Jersey and your 167th Street terminal" (67, 69).

POINT I

The designation of the Broadway bus stops did not vest petitioner with any property rights in them. As a consequence their discontinuance did not constitute a taking of petitioner's property without due process of law.

a. The petitioner did not have a vested property right in the terminated bus stops.

The petitioner's complaint charged that the termination of its bus stop privileges deprived it of its liberty and property without due process of law (57).

We are unable to perceive how the termination or expiration of petitioner's former street bus stop privileges deprived it of its liberty. The petitioner may be subject to penalties and its employees will be subject to arrest only if the employees continue to stop to take on or to discharge passengers at the former street bus stop locations. Besides, the notices which established those street bus stops expressly indicated that their existence was for limited periods which have expired. The expiration of a granted right, limited as to time, does not amount to a taking of property without due process of law. *Detroit United Railway* v. *Detroit*, 229 U. S. 39, 46 (1913).

We can readily show that petitioner does not possess a right to a street bus stop by virtue of either federal law or state law. The federal statute which is the sole basis for plaintiff's operation provides [49 U. S. C. §307(b)]:

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

It is thus clear that no provision of federal law entitles plaintiff to any street bus stop. Petitioner's sole right under federal law as an interstate carrier is to be afforded the use of public streets to enable it to get to its terminal on private property. This right has not been invaded.

Petitioner has no right under New York Law to a street bus stop for the purpose of taking on or discharging passengers. This was the clear holding in *Bus Depot Holding Corp.* v. *Valentine*, 288 N. Y. 115 (1942) where it was said (pp. 120-121)

> "By these regulations the operation of buses engaged in interstate commerce has been confined to certain specified streets in Manhattan. 'Long haul' buses have not been permitted to make 'street stops' in order to pick up or to discharge passengers. Such buses must use terminals on private property and there take on and discharge passengers. These regulations have not heretofore been challenged by owners of property or by operators of buses. Even now the authority of the Police Commissioner to make such regulations is not seriously challenged, and perhaps could not be successfully challenged."

The observation that " 'long haul buses' have not been permitted to make 'street stops' " is a clear indication that the street stops made by other interstate buses have been by permission and not as a matter of right.

Indeed, such stops would constitute the use of the City's streets for the conduct of an omnibus business—an activity

prohibited by the City's Administrative Code, §362-1.0, because plaintiff does not possess a franchise granted by the City's Board of Estimate. That Administrative Code section provides:

> "§362-1.0 *Stage and omnibus routes forbidden until franchise obtained.*—It shall be unlawful for any omnibus route or routes for public use, or any alteration or extension thereof, or any alteration or extension of any existing stage or omnibus route to be operated in or upon any street within the city until and unless a franchise or right therefor shall be obtained from the board of estimate in like manner as, and subject to the limitations and conditions relating to, franchises or rights, provided and imposed by the charter and the code."

b. *The power to establish street stops for buses is a police power the exercise of which the petitioner may not compel.*

In *Cities Service Oil Co. v. City of New York*, 5 N Y 2d 110 (1958), cert. den. 360 U. S. 934 (1959), the Court had occasion to consider the nature of the power to establish bus stops, conferred upon the City's Commissioner of Traffic. The precise question involved was whether the establishment of bus stops in front of the curb cut entrances to that plaintiff's filling station, and the use of such stops in a manner which caused a financial loss, amounted to a taking of property requiring compensation and entitled that plaintiff to injunctive relief.

The Court noted (p. 114) that the then New York City Charter (1063 [new City Charter (883.b] vested the City's Commissioner of Traffic with the power to establish bus stops and held (p. 117):

> "The establishment of bus stops is indisputably performed in the proper exercise of governmental [police] powers and may neither be regarded as a 'taking' nor serve as a predicate for a cause of action. Any loss resulting from the interference with an abutting owner's enjoyment of his property is *damnum absque injuria* and the owner must bear it."

There the plaintiff as an owner of property abutting upon a public highway had a vested property right of access thereto. Petitioner does not have a vested property right in any of the City's public highways. As we have already shown, its only right as an Interstate motor carrier is to be afforded a route to its terminal, a right which it enjoys. The ruling in the *Cities Service* case that the exercise of the police power of establishing bus stops may not be enjoined, requires a ruling that the exercise of that power may not be compelled. Indeed, this is not even a federal question.

Moreover, the petitioner here is seeking not injunctive relief against the termination of street privileges but rather an extension of street stop privileges which have expired. As previously noted (*supra*, pp. 5, 6), the original notices establishing the subject street stops limited their duration to the period of construction work on the George Washington Bridge and the bus terminal at its easterly end, periods which were later extended to February 4, 1962. The petitioner is thus in effect seeking a judicial extension of those street stop privileges.

POINT II

The street stop termination notice applies alike to all interstate buses coming into New York via the George Washington Bridge. As a consequence the fact that interstate buses are permitted street stops in other areas in the City with equal or greater vehicular congestion than within the vicinity of that bridge results neither in unreasonable discrimination nor in a denial to petitioner of the equal protection of the laws. The disposition of the legal issues upon affidavits does not constitute a denial of due process under the Fourteenth Amendment.

The petitioner urges that the action of the respondent in terminating the street stop privileges for petitioner's buses while at the same time permitting such stops for interstate buses in other areas of the City having equal or greater vehicular congestion than exists in the vicinity of the George Washington Bridge amounts to arbitrary and illegal discrimination in violation of its constitutional rights and denies petitioner the equal protection of the laws in violation of its constitutional rights (56-58).

It is to be noted that there is no dispute that there is vehicular traffic congestion within the vicinity of the bridge. Indeed many responsible city officials publicly and officially acknowledged the existence of such congestion in the area near the bridge (117-122).

Under these circumstances, it is plain that the respondent's action does not constitute unreasonable discrimination nor a denial to petitioner of the equal protection of the laws. For the Constitution does not bar all discrimi

nation; it bars only unreasonable discrimination. This has been held to permit legislative classifications to be made based upon any logical reason. *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160 (1912); *Keokee Coke Co. v. Taylor*, 234 U. S. 224 (1914); *Metropolitan Co. v. Brownell*, 294 U. S. 580, 584 (1935).

We need hardly add that the granting of summary judgment in a case where there are no triable issues of fact does not offend any provision of the Constitution. *Ex Parte Peterson*, 253 U. S. 300, 309, 310 (1920); *Fidelity & Deposit Co. v. United States*, 187 U. S. 315, 319, 321 (1902); *Iowa Central Railway Company v. Iowa*, 160 U. S. 389 (1896); *Gen. Investment Co. v. Interborough R. T. Co.*, 235 N. Y. 133, 143 (1923). This case does not involve any material issue of fact. Indeed petitioner has not cited a single issue of fact requiring a trial.

It is thus clear that plaintiff's claims of violations of its constitutional rights are patently without merit.

POINT III

Petitioner distorts the facts and misconceives the issues in the action.

(1)

The statement that "petitioner could not comply with respondent's order * * * [because] That order contradicted the I. C. C. certificates by forbidding service at 'all intermediate points' in New York State" (Petition, p. 7) is not the fact. The I. C. C. certificate did not authorize

stops at intermediate points in New York State. It authorized service between "Ridgewood, N. J., and New York, N. Y.," *serving all intermediate points between Ridgewood, N. J. and New York City.* That does not mean between the George Washington Bridge in New York City and petitioner's bus terminal in New York City. We need hardly add that the Interstate Commerce Commission lacks power to authorize the conduct of an omnibus business on the streets of the City of New York.

(2)

None of petitioner's authorities, except *Parker* v. *Silverton*, 109 Ore. 298, 305; 220 P. 139, 141 (1923) (Petition, p. 11), involved the right of a bus to stop on the streets of a city for the purpose of picking up and discharging passengers. But that case involved an intra-state common carrier operating between the City of Salem and the City of Silverton in Oregon by virtue of a permit issued by the Oregon Public Service Commission. It brought an action to declare null and void a local ordinance adopted by the defendant City prohibiting omnibus operation within that City without the payment of an annual license fee. The court declared the ordinance invalid (p. 141) because it was "an attempt to exercise power not conferred by the [Oregon] Legislature upon the City." The New York City Charter and Administrative Code provisions as noted *supra*, enacted by the New York Legislature, prohibit the conduct of the omnibus business upon the streets of the City without the grant of a franchise.

Callanan v. *Gilman*, 107 N. Y. 360 (1887) (Petition, p. 10) involved the right of the defendant property owner

to obstruct the sidewalk in front of his premises with a wooden bridge so as to bar pedestrians for lengthy periods from using that portion of the sidewalk (107 N. Y. at pp. 368-369). The Court ruled such obstruction to be illegal. The phrase "A coach or omnibus may stop in the street to take up or set down passengers" (107 N. Y. at p. 365) was intended to illustrate street uses which may be authorized, not street uses which may be enjoyed as a matter of right. *Cf. City of New York v. Bee Line Inc.*, 246 App. Div. 28 (1st Dept., 1935), aff'd 271 N. Y. 595 (1936) where the Appellate Division observed (p. 34):

> "The city itself concededly has the power and the duty to prosecute companies which illegally run buses for hire * * *."

It is respectfully submitted that the above authorities demonstrate that the petition does not show the existence of any substantial question of law entitling the petitioner to invoke the jurisdiction of this Court.

CONCLUSION

The petition for certiorari should be denied.

January 21, 1964.

Respectfully submitted,

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